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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., ET AL., PETITIONERS

v.

HOISTING AND PORTABLE ENGINEERS

LOCAL UNION NO. 701, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This memorandum is submitted pursuant to the Court's order of February 20, 1967, inviting the Solicitor General to express the views of the United States. The facts are set out in the petition for certiorari, the opinion of the Supreme Court of Oregon (Pet. 3–5, 18–19), the Board's decisions and orders (141 NLRB 469, 132 NLRB 648), and the record documents filed with the Court, and may be briefly summarized as follows:

Petitioners were three members of a broader multiemployer bargaining unit, which had a contract with respondent Hoisting and Portable Engineers Local Union No. 701 ("the Union") (141 NLRB 469, 470, 473, n. 8). A collective bargaining agreement between the multiemployer unit and the Union expired on December 31, 1958 (132 NLRB 648, 651). The members of the multiemployer unit sought to bargain for new contract terms through their bargaining representative, Cascade Employers Association, Inc. ("Cascade") (132 NLRB 648, 651; 141 NLRB 369, 470, 472–473). The conduct of those negotiations gave rise to unfair labor practice proceedings before the Board.

The Board found that the Union, in violation of Section 8(b)(1)(B) and (3) of the National Labor Relations Act,[1] restrained and coerced the petitioners and others in their selection of Cascade as their bargaining representative in an established multiemployer unit, and refused to bargain with Cascade. *Hoisting and Portable Engineers Local Union No. 701 (Cascade)*, 141 NLRB 469, 473–474; 132 NLRB 648, 651–653, 655 (Pet. 19–20). As to the petitioners, the Board further found that the Union's pressure succeeded in forcing them to execute individual bar-

[1] Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Section 8(b)(3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees * * *."

gaining agreements with the Union (141 NLRB at 474, 132 NLRB at 652).

In addition to directing the Union to cease and desist from the unlawful conduct, to bargain with Cascade in the multiemployer unit, and to post appropriate notices, the Board's order directed the Union to cease and desist from "[g]iving effect to [these] individual contracts * * * or any modification, continuation, extension, or renewal thereof" (141 NLRB at 474). The Board's final order issued on March 13, 1963 (141 NLRB 469, 474–475). In June 1963, the case before the Board was closed on the ground that the affirmative requirements of the Board's order had been satisfactorily complied with.

Petitioners thereafter commenced suits in an Oregon court against the Union and the trustees of the Union's health and welfare and pension funds (Pet. 18). The complaints recited that, from approximately May through August 1959, the Union had restrained and coerced petitioners in their right to bargain through a multiemployer association, Cascade, and had refused to bargain with Cascade, in violation of federal law; that the Union by such conduct had coerced petitioners into agreeing to separate contracts in violation of federal law; and that the Board, in its decision of March 13, 1963, had found this conduct to be illegal under federal law and had ordered that the contracts be "voided, set aside and of no effect" (Pet. 3, 18–19; R. 2–3, pars. V, VI). The complaints further alleged that, as a consequence of these contracts and of the Union's unlawful conduct, peti-

tioners paid various sums to the Union's health and welfare and pension trust funds[2] and to the employees; and that these sums were paid prior to the Board's decision, under compulsion of the contracts, and would not have been paid except for the contracts and the unlawful conduct of the Union (Pet. 3, 18, 19; R. 3, pars. VII, IX).[3]

The complaints sought rescission of the contracts and restitution from the Union and the trustees of the sums paid thereunder (R. 5).[4] The complaints alleged that recovery from the Union of the sums paid pursuant to the contracts was not a remedy available to petitioners before the Board, that the Union's trust funds and the trustees were not and could not be parties before the Board, and that the Board had no procedures or processes by which the trusts or trustees

[2] The contracts provided for payments into the health and welfare and pension funds established pursuant to agreements between the Union and the Portland Chapter, Associated General Contractors of America.

[3] The sums allegedly paid the employees were "additional wages" under the contracts (Pet. 18). The various sums paid by each Company as additional wages and trust fund contributions were alleged to be as follows (R. 3, *et seq.*, First Cause, par. VII):

Company	Health and Welfare Fund	Pension Fund	Additional Wages
Corvallis Sand & Gravel Co.	$5,020.00	$4,035.70	$21,199.39
Eugene Sand & Gravel Co.	2,996.00	718.20	24,176.05
Wildish Sand & Gravel Co.	4,802.00	1,446.45	28,689.41

[4] From the trustees, the Companies sought to recover only the sums paid into the trusts; from the Union, the Companies sought to recover both these sums and the additional amounts paid to employees as wages under the contracts (R. 5).

could be ordered to make restitution of the amounts paid to the trusts under the requirements of the contracts (Pet. 3–4, 25; R. 3–4, pars. X, III).

The Union and the trustees filed demurrers on the grounds that the complaints failed to state facts sufficient to constitute a cause of action, and that the subject matter of the suits was preempted by the National Labor Relations Act and thus within the exclusive jurisdiction of the Board (Pet. 4, 19; R. 10–11). The demurrers asserted that defendants would further contend that petitioners sought relief from the Board, obtained and accepted such relief, and asked for no more (Pet. 19; R. 10–11). The trial court sustained the demurrers and dismissed the complaints (Pet. 4, 18; R. 12, 15).

The Supreme Court of Oregon affirmed (Pet. 17–28). The court held that petitioners' claims for rescission of the contracts and restitution of the moneys paid thereunder rested solely on the ground that the contracts were procured through the unfair labor practices of the Union (Pet. 21–23, 24). "There is no state right which the court is requested to vindicate" (Pet. 23). Accordingly, the court concluded that the fashioning of a remedy for the wrong that was the gravamen of the complaints was within the exclusive province of the Board, and the State court was thus without jurisdiction of the suits (Pet. 22–25).[5]

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[5] The court quoted from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247: "* * * 'It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may

Addressing itself to petitioners' contention "that the granting by a state court of the relief sought would not interfere with, but rather [would] aid and be in conformance with the Board's policy," the court stated (Pet. 24–25):

> If it was the Board's belief that the "expunging" of the union's prior unfair labor practices required the union to make restitution of the additional money paid its members, the Board would so have ordered. * * * The Board's failure to order restitution indicates its belief that in this instance federal labor policy did not require it.

Respecting the further contention "that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of [the] claims against the trustees," the court added (Pet. App. 25):

> Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief

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be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, *since remedies form an ingredient of any integrated scheme of regulation*, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.'" (Emphasis added by the court, Pet. 21–22.) And the court added (Pet. 22–23): "The determination of the relief to which a party to a collective bargaining agreement may be entitled, where the agreement was obtained by unfair labor practices, is sufficiently important in the regulatory process to be within the sole province of the Board. * * * This is not a situation where the activity regulated was a merely peripheral concern of the LMRA, nor did it relate to the vindication of interests which were deeply rooted in local feeling and responsibility in which there were, therefore, overriding state interests."

> against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. * * *

Finally, the court rejected petitioners' contention that the complaints stated a cause of action which could be entertained under Section 301(a) of the Labor Management Relations Act (29 U.S.C. 185(a)). The court pointed out that the "present suits are to rescind the contracts involved, not for their violation" (Pet. App. 27).

Petitioners do not here challenge the decision below insofar as it holds that their suits against the Union (for additional wages and payments into the trust funds) are preempted by federal law and are within the exclusive jurisdiction of the Board. The petition for certiorari challenges only the court's holding that petitioners' suits against the trustees for the trust fund payments are also preempted (Pet. 3, n. 2).

DISCUSSION

Petitioners urge this Court to consider the extent, if any, to which the jurisdiction of State courts may be invoked to supplement the remedial efforts of the National Labor Relations Board. We believe that

there may well be cases in which Board rulings as to the scope of the appropriate remedy may raise issues relating to State-created rights that may properly be determined by State courts. Thus the Board has expressly left for State resolution the determination of property rights resulting from the Board's disposition of an intra-union schism. *Boston Machine Works Co.*, 89 NLRB 59, 61. This is not such a case, however. For here, as we show below, petitioners sought simply to have a State court augment the relief that the Board gave for the unfair labor practice it found. In the circumstances, we believe that the Supreme Court of Oregon correctly held that the relief sought could be obtained, if at all, exclusively from the Board and that the subject matter of this action, therefore, was preempted by the National Labor Relations Act.

1. Petitioners do not purport to seek relief for any conduct proscribed by State law. As the court below noted, "[t]here is no state right which the court is requested to vindicate" (Pet. App. 23). Petitioners seek a remedy for conduct constituting an unfair labor practice under Section 8(b) (1)(B) and (3) of the National Labor Relations Act, as previously determined by the Labor Board. The Board's cease and desist order is expressly alleged and relied on in the complaints (Pet. 2; Pet. App. 19–20). Petitioners do not dispute (Pet. App. 21) that, under well-established doctrine, the Board—and only the Board—had jurisdiction to determine whether the Union had violated Section 8. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. In these

circumstances, the court below correctly held that the fashioning of a remedy was also within the Board's exclusive primary jurisdiction.

That holding is soundly based on the proposition, frequently reiterated by this Court, that "[t]he particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' *I.A. of M.* v. *Labor Board,* [311 U.S. 72, 82]; *Labor Board* v. *Link-Belt Co.,* [311 U.S. 584, 600]." *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 539–540. At least where, as here, the Board's jurisdiction to determine the substantive issue is exclusive, its power to shape the appropriate remedy is also exclusive, "since remedies form an ingredient of any integrated scheme of regulation" (*Garmon,* 359 U.S. at 247).

Had the issue of recoupment been presented to the Board, it might have concluded that it would be too speculative to attempt to determine the difference between the terms that were negotiated individually and those that might have been negotiated through Cascade; or it might have concluded that a reimbursement order would be excessive for the violations found, or that to impose such a remedy would not be conducive to satisfactory bargaining relations between the parties in the future. Had the Board so ruled, it seems clear that the principles of *Garmon, supra,* would have barred any effort to recoup the benefits in a State court suit brought against the Union, the trustees, or both. Petitioners should not be in any better position merely because they failed

to present the issue of recoupment to the Board.[6] Indeed, petitioners now appear to concede that their suits are preempted insofar as the claims against the Union are concerned (*supra*, p. 7).[7] In any event, the remedy fashioned by the Board in this case was

[6] See n. 9, *infra*, p. 13.

[7] *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, relied on by petitioners (Pet. 10), is not inconsistent with the above analysis. There, the Board found that the employer, through the commission of unfair labor practices, forced his employees to enter into individual contracts whereby they agreed not to demand a closed shop or that the employer sign a contract with any union. The Board ordered the employer, *inter alia*, to cease giving effect to these contracts, and to so notify the employees. This Court sustained the Board's order, construing it as precluding the employer "from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it" (309 U.S. at 365). To be sure, the Court, in answer to the contention that the order was defective because the individual employees were not parties to the proceeding, stated that the Board's order "does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication" (*ibid.*). But, it added (*ibid.*):

> We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. Section 10 (a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice.

It is apparent that nothing in *National Licorice* would sanction an attempt by petitioners, who were parties to the Board proceeding, to obtain, through the medium of a state court suit, a remedy for unfair labor practices which goes beyond what the Board has, or would have, provided.

tailored to the Board's appraisal of the Union's unlawful conduct in the light of national labor policy. For other tribunals to supply other remedies for the very wrong that the Board's cease-and-desist order sought to right would unavoidably entail the danger of conflicting regulation that the *Garmon* rule was designed to forestall.

Furthermore, this clearly is not a case in which particular care must be taken to accommodate the federal regulatory scheme to important State interests or responsibilities. As the court below candidly recognized (Pet. App. 23), the conduct to which petitioners' claim is addressed is neither of "merely peripheral concern" to federal labor law nor has it "touched interests * * * deeply rooted in local feeling and responsibility" (*Garmon,* 359 U.S. at 243–244). Precisely because no State interest whatever was involved, the court below concluded (Pet. App. 25):

> If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended.

In this respect the present case is in sharp contrast to those cited by petitioner (Pet. 7). Thus both *Thacher* v. *United Construction Workers, etc.,* 10 N.Y. 2d 439, 180 N.E. 2d 245, and *People* v. *Automobile Transporters Welfare Fund,* 13 N.Y. 2d 814, 192 N.E. 2d 222, certiorari denied, 376 U.S. 908, involved the relationship between State insurance regulation, which is surely a matter of traditional State concern, and

Section 302 of the Labor Management Relations Act (29 U.S.C. 186), which has not been thought to occupy the field. See *Moses* v. *Ammond*, 162 F. Supp. 866 (S.D. N.Y.).

2. Petitioners urge (Pet. 8–9) that the relief they now seek could not have been obtained from the Board. Assuming, for a moment, that the contention is correct, it does not follow that the State courts have jurisdiction. On the contrary, as this Court wrote in *Garmon*, "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" (359 U.S. at 247).

Furthermore, the assumption that the Board was powerless is mistaken. As the court below observed, the Board could have ordered reimbursement from the Union if it had determined that the illegality involved in procuring the contracts was so pervasive that it could only be cured by restoring to petitioners the health and welfare and pension contributions paid out under the contracts (Pet. App. 24–25).[8] It would be no defense to such an order that the Union did not itself have possession of the moneys that had been paid into the health and welfare and pension funds. *Operative Plasterers' Local No. 2 (Hansen)*, 149 NLRB 1264, 1268–1269; *International Hod Carriers, etc., Local 1082 (Boggs)*, 150 NLRB 158, 165–166, 181; *Plasterers' Local Union No. 739, et*

[8] Section 10(c) of the National Labor Relations Act empowers the Board to require the person who has committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

al. (*Hansen*), 157 NLRB No. 79; see *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 544. Moreover, as petitioners recognize (Pet. 8, n. 6), the Board has also ordered the trustees of union-employer funds to disgorge moneys illegally secured or retained where the trustees were found to be acting as agents of the respondents. *Local 80, Sheet Metal Workers (Turner-Brooks)*, 161 NLRB No. 7; *J. J. Hagerty, Inc.*, 139 NLRB 633, enforced in relevant part *sub nom. Local 138, I.U.O.E.* v. *National Labor Relations Board*, 321 F. 2d 130, 137 (C.A. 2). Accordingly, petitioners' assumption that the Board could not have ordered reimbursement of the moneys paid into the trust funds, had it deemed that remedy appropriate, is erroneous. In these circumstances, to permit petitioners to go into a State court to secure such reimbursement would afford a means of negating the Board's judgment on the appropriate remedy for the Union's unfair labor practices.[9]

3. Finally, petitioners seem to suggest (Pet. 6–7) that the relief they seek is somehow implicitly authorized by the Board's order. Thus they argue that they are only attempting "to wind up" agreements

[9] Petitioners did not seek a reimbursement remedy before the Board although they were parties to the proceeding. The Trial Examiner's original Intermediate Report and Recommended Order provided only that the Union should cease and desist from giving effect to the contracts or any continuation, modification, extension, or renewal—the provision ultimately adopted by the Board. Cascade, as charging party, filed a brief in support of the report and recommended order, and took no exceptions to it.

invalidated by the Board (Pet. 6) or to follow through on the "contractual consequences of the Board's determination" (Pet. App. 23). There is, however, no reason to suppose that restitution either of wages or of trust fund payments was contemplated by the Board or entailed in its order. Where the Board has intended to provide for restitution it has done so quite explicitly (see pp. 12–13, *supra*). Here the Board terminated its proceedings, having satisfied itself that the requirements of its order had been complied with.

Implicit in petitioners' contention that they merely seek to effectuate the Board's order is the assumption that the Board, in ordering that the Union cease giving effect to the unlawfully procured contracts, invalidated the contracts *ab initio* and hence contemplated recoupment of the payments made thereunder. There is no warrant for such a construction of the Board's decision. Petitioners never presented this issue to the Board (see n. 9, *supra*), and, even if they had, there is no reason to believe that the Board would have ordered a return of the benefits paid under the contracts.

Petitioners' contention (Pet. 6) that they merely wish "to wind up the affairs of the trusts as to these employers" in no way obviates the fact that they seek to have a State court enlarge upon a remedy formulated by the Board for an unfair labor practice. The trusts were created and are governed by trust agreements entered into between the Union and the Associated General Contractors of America, Inc.[10]

[10] We are lodging with the Clerk a copy of each of the two trust agreements.

The Board found no infirmity in the trust agreements, as opposed to the collective bargaining contracts, and petitioners allege none. Petitioners, as well as many other employers, made payments into those trusts on behalf of their employees, but those payments are not in any relevant sense distinguishable from wage payments, as to which petitioners have abandoned their claim (Pet. 3, n. 2). Petitioners have no on-going involvement in the administration of the trusts; indeed, they have no more interest in the affairs of the trusts than they have in the ways in which their employees spent or saved their wages. There is, in short, nothing to "wind up."

CONCLUSION

For the foregoing reasons, we believe that the Supreme Court of Oregon correctly determined that petitioners' suits are preempted by the National Labor Relations Act. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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